

Memory Matters: Contexts for Understanding Sexual Abuse Recollections,
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Chapter four:

Speaking up against justice: credibility, suggestibility and children's memory on trial

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Introduction

Judge: And if you do always tell the truth where will you go when you die?

Girl: Up to heaven sir.

Judge: And what will become of you if you tell lies?

Girl: I shall go down to the naughty place, sir.

Judge: Are you quite sure of that?

Girl: Yes, sir.

Judge: Let her be sworn, it is quite clear that she knows more than I do!

(Mr Justice Maule (1788-1858) examining a young witness on the nature of the oath, quote as Spencer & Flin 1993, p.51).

Child witnesses have always posed a challenge to legal practice, testing the laws of evidence and necessitating special rules and procedures. The quote above gives an historic example of special procedures introduced for child witnesses. In the mid 19th century in England judges had to examine child witnesses on the nature of the oath to establish whether they were competent witnesses, worthy to take the oath. In this brief

exchange with the young witness Mr. Justice Maule negotiates and establishes what can be termed the ‘conditions of credibility’. He is not concerned with the reliability of the girl’s memory or her truthfulness, but being of young age she must demonstrate, by displaying a certain kind of knowledge, that the principles motivating her truthfulness are appropriate. In England in the mid 19th century ‘fear of god’ establishes credibility and guarantees truth; this is what constitutes the ‘condition of credibility’ in this moment.

In this chapter I suggest that the scientific and public debate on memories of sexual abuse could benefit from a detailed examination of how legal systems negotiate the tensions and ambiguities surrounding children’s memory of sexual abuse, including legal attempts to make children’s voices heard. This means examining memory in terms of the concrete practices through which its expression is negotiated, and to explore the dynamic and shifting conditions under which credibility is assessed and established. I will illustrate this approach by exploring child witness practices in England/Wales¹ on the background of the history of sexual abuse and child witnessing. The chapter draws on interview data from a larger research project that has compared child witness practice in England/Wales and Germany against the backdrop of a genealogy of suggestibility research (Motzkau, 2006).² I begin by positioning the issue of child witnessing and sexual abuse in a contemporary context.

¹ Northern Ireland and Scotland form independent legal jurisdictions with different legal procedures.

² “Cross-Examining Suggestibility: Memory, Childhood, Expertise” (Motzkau, 2006). The transdisciplinary approach combined a genealogy of the history and theory of suggestibility research with the analysis of empirical data gathered in interviews with legal practitioners and psychological researchers/experts in England and Germany.

Situating the problem: child witness practice in England and Wales

As a result of an increasing awareness of child sexual abuse since the 1970s, courts across Europe and Northern America have admitted children as witnesses more frequently. Yet, there has been persistent wariness about the reliability of children's memory, and their ability to give evidence in legal proceedings. Since the late 1980s legislators in England/Wales have systematically consulted psychological research on children's memory and suggestibility to inform measures that could ensure better access to justice, particularly for child victims of sexual abuse. In 1991 they began to introduce special measures that protect child witnesses by accommodating their perceived needs, while at the same time ensuring the admissibility of their evidence in court (Spencer & Flin 1993). This laudable effort stands in stark contrast to the fact that conviction rates for cases of rape and sexual abuse in England/Wales have dropped from 32% in 1977 to an all time low of 5.5% in 2002 (Kelly et al 2005), and 6% in 2005/2006 (Feist et al 2007). With this England/Wales (alongside Northern Ireland) continue to register the lowest conviction rates in Europe (Kelly et al 2005). In this context it is worth asking, what exactly constitutes the concrete conditions of credibility, and how do they relate to the apparent counter effectiveness of the measures introduced to accommodate child witnesses?

While courts of law have always played a notorious (and often tragic) role in the heated international and national debates around memory and sexual abuse, the literature on these debates lags in terms of an examination of the actual minutiae of national legal practices. These details, I would suggest merit close scrutiny because legal practices shape the powerful institutional processes that make memory matter in a range of contexts with lasting consequences for the lived realities of many.

I am focussing on child witnesses in particular because discourses around childhood and child protection are key to understanding the conditions under which recollections of abuse come to matter. In a critique of developmental psychology Burman (1994, 1997) points out that the way in which children are represented as ‘natural origin’, or the biological starting point of human functioning, turns them into ‘methodological devices’ that are used to understand adult memories of the past, warranting the classification of such memories as ‘normal’/‘abnormal’, true/false. In this sense ‘children’ and the concept of ‘childhood’ function as a powerful currency within psychological and cultural practices, as Burman (1997) puts it, because they appeal to core cultural assumptions about origin, (sexual) innocence, goodness and immanence. My analysis will focus particularly on discourses around gender, agency and protection. I will demonstrate how conflicting repertoires around protection, gender and agency contribute to the paradoxical constitution of children’s credibility, creating ambiguous and ultimately silencing positions for children.

Methods perspective

This analysis is situated within a critical qualitative and discourse analytic framework. The challenge of understanding childhood memories of abuse in relation to child witness practice comprises a methodological dilemma. While taking seriously the ‘material truth’ claims guiding the legal discourse’s (proper) concern with justice, I will also examine the efficacy of the practices ‘generating’ those material truths. My perspective thereby straddles between that of ‘realism’ and ‘constructionism’. In order to face up to this methodological dilemma I pursue this analysis in an exploratory spirit, adopting a syncretic methods perspective. I deliberately combine two different discourse analytic frameworks that have by some been considered incommensurable (MacMartin, 1999), because they are seen to adopt contrary theoretical and methodological stances. First, the interview data is approached by utilising analytic tools associated with discourse and conversation analysis (Wetherell & Potter, 1992; Potter & Wetherell, 1987). Second, the broader analysis of the historical and socio-political context of child witness practice draws on what Parker termed ‘critical discursive research’ (Parker, 2002; Parker, 1992; Burman, 1994). Here the interview material is discussed through a critical account of historical, political and cultural dynamics that shape the acute reality of child witness practice, and the conditions of credibility. By simultaneously utilising these two analytic frameworks I hope to productively suspend the issue of constructionism versus realism that has in the past led to polarised debates between representatives of these two approaches (Edwards et al. 1995; Parker, 2002). This way I hope to illustrate the possibilities emerging from what Latour expresses so pointedly in his comment on the debates around constructionism and realism.

“So we do not have to choose between realism and social construction because we should try to imagine a sort of mix up between the two ill-fated positions. Rather we have to decide between two philosophies: one in which construction and reality are opposite, and another in which constructing and realising are synonymous.”

(Latour, 1997, p. xiv)

Inspired by Latour’s suggestion, we will see that it is by adopting the latter of these two philosophies (the one that considers constructing and realising as synonymous), that we might gain a more productive understanding of the dynamics that constitute the conditions under which memories of sexual abuse can be understood: the truth about the memory of trauma is at once ‘constructed’ and ‘realised’. On a theoretical level Latour herein echoes theorists such as Hacking (1995), who suggests, in discussing issues around sexual abuse, “It *is* a real evil, and it was so before the concept was constructed. Neither reality nor construction should be in question.” (Hacking, 1995 p. 68).

Focusing on the concrete instant when memory is expressed, as well as the contexts and the conditions of its expression, will alert us to the fact that constructing and realising are always in play at the same time when memory emerges. This chapter will demonstrate that realising and constructing are both constitutive dimensions of memory as it is expressed. I argue that exploring this dynamic tension in the context of child witness practice can open a new perspective for the broader debate around the matter of memory.

MEMORY, SUGGESTIBILITY AND CHILD SEXUAL ABUSE

The history of research on memory and suggestibility and the history of child witnessing and sexual abuse are intricately connected. I begin my analysis by mapping the broad historical, scientific and legal conditions under which children's memories of abuse are expressed and assessed at the intersection of psychology and law.

Children have traditionally held a dubious reputation as witnesses in courts of law. One of the most notorious set of cases, routinely cited as a cautionary tale of the unreliability of child witnesses, are the Salem witch trials in the USA in the 17th century.³ Ceci & Bruck (1995) suspect that these trials were partly responsible for the deeply rooted mistrust practitioners in Northern American and European legal systems hold towards child witnesses. This mistrust is for example reflected in the corroborations laws that applied in a number of western countries, including the USA and England/Wales until the mid 1980s. These laws admitted children's testimony only if it was corroborated by an adult eyewitness (Spencer & Flin, 1993, Motzkau, 2006). It was found that this criterion posed particular problems for the prosecution of sexual abuse cases because in many of these cases the child victim may have been the only witness.

The concept of child sexual abuse, perceived as a social phenomenon, has only formed within the last few hundred years and, as Haaken (1998) puts it, has since had a long history of being forgotten and remembered. Throughout the 18th and 19th century

³ In 1692 Salem (Massachusetts) 19 villagers were convicted of witchcraft and executed based on evidence given by a group of children (in spite of the children withdrawing their accusations during the trial). (Spencer & Flin, 1993).

numerous documented cases and scientific references reflect public awareness of child sexual abuse. Yet in the early 20th century such cases became rare and apart from very few exceptions, Dalglish & Morant (2001, p. 8) observe that “there is almost no published work on the consequences of CSA in the first 60 years of the twentieth century“. While isolated legislative efforts, for example in England, reflected some awareness for the issue of child sexual abuse, “there is an absence of any real professional or public debate about the issue until the 1960s or 1970s” (Dalglish & Morant, 2001, p. 8).

Child sexual abuse re-entered public awareness and discussion in the late 1960’s and 70’s, when the feminist movement gained political momentum and put issues like domestic violence, rape and child sexual abuse back into the public arena (Haaken, 1998; Levett, 2003). As a result of this increased awareness of child sexual abuse the corroboration laws came under scrutiny, and during the 1980’s changes to judicial systems in Northern America and some European countries meant that courts admitted children’s testimony in cases of alleged sexual abuse much more frequently (Westcott et al. 2002).

Yet the new public trust in children’s memory and testimony was undermined again. During the 1980’s courts in Northern America and parts of Europe (e.g. England and Germany) saw a number of high profile miscarriages of justice in child abuse cases that hinged on evidence given by children. In some cases children were reporting the most bizarre scenarios of ritualistic abuse by multiple perpetrators. Yet, the accounts were later

dismissed as the result of suggestive and coercive questioning techniques by (presumably) well-intentioned carers or investigators (Ceci & Bruck, 1995; Ceci & Hembroke, 1998; Bell, 1988; Lee, 1999; Bull, 1998; Steller, 2000). These cases sparked an unprecedented research interest in children's suggestibility, a topic that had so far been entirely absent from the scientific agenda. At this point in the history of child sexual abuse, the question of children's suggestibility becomes crucial for assumptions about children's ability to remember traumatic events. So from this point on children's conditions of credibility are largely constituted by the varying concepts and assumptions about 'suggestibility'. At this point, it is worth taking a brief look at the history of suggestibility research, because it forms the backdrop against which children's credibility is now assessed.

The history of suggestibility and child sexual abuse

Around 1880 both, memory and suggestibility constituted central research topics for the nascent discipline of psychology. While memory remained a central topic, the interest in suggestibility waned in the early 19th century, and between the 1950's and the late 1970's suggestibility vanished completely from the scientific agenda (Gheorghiu, 2000; Motzkau, 2006). Suggestibility only re-emerged as a research topic in the 1980's in the context of the growing concern over children's evidence in sexual abuse cases. Yet, researchers have continually struggled to define suggestibility. A rather broad definition that is used frequently states that suggestibility is "...the degree to which children's encoding, storage, retrieval, and reporting of events can be influenced by a range of social and psychological factors." (Ceci & Bruck, 1993, p. 404).

Throughout the 1990s the re-emerging concern of child sexual abuse is more and more dominated by this turn to suggestibility. Rather than attending to the variable determinants of children's memories as such, a myriad of studies then turned towards an investigation of the potential malleability of children's testimony. Research in this field remained riddled with contradictory results, and while numerous studies underlined children's ability to remember and to testify reliably (Goodman & Clarke-Steward, 1991), research also demonstrated that children could be made to deliver credible reports of events had not happened. Such research concluded that it was possible, by using suggestion, to implant false memories into children (Ceci et al. 1994). It is interesting to note that the equally plausible reverse case, i.e. abused children being coached (e.g. by the abuser) into reporting (or even believing) nothing had happened, hardly featured at all until very recently (Lyon 2006, Pope 1996).

'Implanted memory research' with children fascinated the public and attracted the attention of the international media (Burman, 1997). However, this research also raised methodological as well as ethical questions and generated heated international public and academic debates. Stephen Ceci (Ceci et al, 1994), who was the first to claim having experimentally implanted false memories, was criticised harshly on ethical grounds for what the critics considered a violation of children's rights. His experiments, the critics feared could irretrievably change and thus damage participating children's memories (Herrman & Yoder, 1998; Yoder and Herrman 1998). Other researchers in the field criticised Ceci for methodological and experimental inaccuracies, pointing to unfounded or vastly overstated results and inaccurate statistics (Goodman et al. 1998; Erdmann

2001; Ceci, 1998; Motzkau, 2005). These debates were widely covered by the media, which fuelled a simplistic understanding of suggestibility research in the public. Ultimately this fostered an exaggerated fear of children's vulnerability to suggestion. A number of researchers pointed out that the resulting wariness about children's suggestibility also filtered into legal procedure and decision-making, reinstating a general atmosphere of disbelief in children's testimony (Greuel 2001). This atmosphere is also thought to have discouraged children and parents from reporting abuse, and was seen to dispose jury members against child witnesses (Goodman et al. 1998).

Implanted memory research and the net-effects of the debate surrounding it, had wider international repercussions. In England/Wales for example, the judicial studies board decided to use a film about Ceci & Bruck's implanted memory research as part of a training course for judges (Westcott, 1998). Academics in the field harshly criticised the use of this film, because, as they say, "Ceci and Bruck's work gives 'the impression that (...) children's accounts of abuse are often false.'" (Myers, 1995, p. 392). Given the multiple methodological and ethical problems surrounding this research, the critics feared that, rather than providing the balanced scientific advice intended by the judicial studies board, this film would prejudice judges against child witnesses by offering an unfounded but "convincing demonstration of the unreliability of children's evidence" (Plotnikoff & Woolfson, 2002, p. 302). Critics fear that the use of this film reflects the generally negative attitude towards children's credibility as court witnesses that will make the prosecution of sexual abuse even more difficult.

Let me sum up the shared history of memory, suggestibility and child sexual abuse so far. The emerging trust in children's ability to accurately remember and report events that had triggered the legal changes of the 1980's, has once more been overcome by the persistent wariness over the reliability of children's testimony and their vulnerability to suggestion. However, over the decades there has been a marked shift in the criteria that define the conditions of credibility. Since the late 1990's the guiding theme is not 'sincerity' (or fear of god for that matter), or the capacity of children's memory as such, but now children's vulnerability to suggestion is the main issue determining the conditions of their credibility. Suggestibility however, remains an elusive and contested phenomenon, sparking debates that illustrate the complex scientific and legal stakes involved. We could see how the scientific community itself is inadvertently drawn into heated public and legal debates, thereby potentially affecting real life court cases. As a result of such net-effects, debates about children's credibility become increasingly polarised and charged, further complicating the prosecution of child sexual abuse.

To get a more complete picture of what this 'turn to suggestibility' means for current child witness practice in England and Wales, the history of child sexual abuse also needs to be considered against the backdrop of changes in international law.

Children's Rights, memory and credibility

Since 1989 international law unequivocally established that children must be given a voice in legal proceedings concerning them. Article 12 of the UN convention of children's rights (1989)⁴ states that...

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purposes the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

(General Assembly of the UN 1989)

This article is clearly set out to improve children's access to justice by establishing that they need to be given a voice in court. However, on closer inspection we can see that this article contains a twofold conditional clause, illustrating that the ambiguity surrounding children's conditions of credibility also pervades international law. The capability of forming own views and "age and maturity" are not 'given' by the law, but article 12 leaves it open as to how they are established locally, in context and with regard to each particular child. For this to work there have to be criteria for judging this "maturity", and

⁴ Ratified by all nations (exceptions: Somalia, USA).

depending on country and context these criteria will be delivered by cultural and/or developmental psychological knowledge. So by introducing open concepts such as ‘maturity’ the law implicitly refers the question of children’s voice back to the specific context and to developmental psychology. The second conditional clause is to be found in the formulation that the “opportunity” provided to be heard, will be realised according to the existing rules of the respective national law. Again article 12 leaves the provision of a voice widely open to interpretation, and rather than solving it, passes the question back to individual rules of legal procedure. Lee (2001) argues that this apparent ambivalence towards children, that seems implicitly to invalidate the very promise it is attempting to make, was an unavoidable ingredient of this law at the time of its creation. If article 12 functions, Lee argues, it functions to generate and expose, rather than to resolve, the otherwise implicit childhood ambiguity and “then lays the responsibility for managing that ambiguity on the legislatures and policy-makers of the states that have ratified it.” (Lee, 2001, p. 96). What Lee terms childhood ambiguity is the issue at the heart of societal and scientific issues around child sexual abuse on the one hand, and children’s credibility and suggestibility on the other. Article 12 of the UN convention of Children’s Rights demonstrates that children’s memory and credibility remain a problem situated somewhere between psychology and law, between psychological and legal truths, and thus are negotiated and produced at the intersection of psychological and legal practices. They have to be managed locally and continuously via the practices implemented to handle, negotiate and contain such ambiguity.

The ambiguous stance international law makes within the history of memory, suggestibility and child sexual abuse, clearly highlights the importance of exploring concrete legal practice for understanding children's conditions of credibility. We found earlier, that over the past decades there has been a shift in focus from a concern about children's memory to a wariness of their suggestibility. We can now see that this shift in focus from memory to suggestibility has two central implications for legal practice. *First*, with suggestibility as the primary issue, the focus shifts from potential deficits in memory encoding or storage to the instant of remembering as such, i.e. attention is directed to the expression of memory. Now the concrete conditions under which remembering is called for and occurs, and the circumstances under which memory is reported, become key to legal considerations of accuracy and credibility. Thus legal procedure now has to acknowledge that remembering is a reciprocal and contextual dynamic: remembering involves the rememberer as much as those who listen/ask, and it depends on the circumstances under which this process takes place. Inevitably this poses a dilemma for legal practice which now has to take into account its own unwitting influence on child witnesses' memory, and the way it is expressed and perceived. And legal practice has to do this in the light of contradictory and inconclusive research about suggestibility. *Second*, the concept of suggestibility itself affords an intriguing shift in the attribution of the 'ownership' of memory. With suggestibility the idea is introduced that children, particularly, are not in control of their own memories, i.e. that they cannot exercise authority over the contents of their memory and thus cannot be trusted to assess the truth value of events they remember. On the one hand assuming children are not in control of their own memories solves the dilemma of having to suspect children had deliberately

given false accounts in court cases. But on the other hand, assuming children are not in control of their memories also means that the criteria for their credibility cannot be found within them. Following this rationale credibility always has to be established via external criteria. Yet, this means such judgements would have to rely on the guidance of research findings or ultimately the public's common sense. Considering the lack of clarity about the phenomenon of suggestibility and the ambiguous ways in which research itself became drawn into the net-effects of public and legal debates about sexual abuse and suggestibility research, this seems a circular solution. So by referring the problem back to the ambiguous criteria and operations at the intersection of psychological and legal practice, the conditions of children's credibility are effectively rendered paradox. It is the same kind of paradoxicality we can observe in article 12 of the UN convention of children's rights makes the promise of giving children a voice, while implicitly invalidating this promise through the way it is passed on as an ambiguous task for psychological and (in particular) legal practices. In the following I will examine in more detail how legal practices in England and Wales handle this promise.

CHILD WITNESS PRACTICE IN ENGLAND/WALES: CREATING RELIABLE WITNESSES

How and at what cost do different legal practices address this dilemma of having to give children a voice while systematically distrusting their ability to satisfy the legal 'call to truth'? How do they handle the paradox of credibility and what are the specific conditions of credibility for children's memories as they emerge in legal practice? I have examined

these questions in detail in a study that compared child witness practice in England/Wales and Germany (Motzkau, 2006). In the following I will draw on two exemplary interview excerpts from this study, and explore child witness practice in England/Wales in the light of latest procedural changes. Tracing the way the expression of memory is negotiated in these excerpts, I focus in particular on colliding discourses around child protection, gender and the child's agency within the context of sexual abuse.

In 1988 England/Wales had abolished the corroboration laws that previously excluded children's evidence unless corroborated by an adult eyewitness. In the following decade legal procedure saw further dramatic changes. The 1991 Criminal Evidence Act⁵ and the Youth Justice and Criminal Evidence Act 1999 implemented a number of special measures for children and other 'vulnerable witnesses'.⁶ Crucially these measures include the facility for children's evidence to be video recorded during their initial police interview. This video can be passed on to be reviewed by the prosecution, and where it comes to a trial, the video will be played in court to the jury to replace the child's 'evidence in chief' (initial witness statement in court). Other measures aim to assist children's potential courtroom appearance, and children are routinely cross-examined via live CCTV link, avoiding their courtroom appearance altogether. Overall these measures create conditions under which children are hoped to provide the most detailed and

⁵ Acts of Parliament <http://www.opsi.gov.uk/acts>

⁶ Children are now defined as 'vulnerable witnesses'. The term 'vulnerable and intimidated witnesses' includes all witnesses under the age of 17 and adult victims of sexual and physical violence (for details: articles 16.-17., Youth Justice and Criminal Evidence Act 1999).

accurate information because they are less intimidated or confused. Effectively one could say that these measures act as a filter for information; they are a form of informational hygiene. The measures purify or filter information by minimising fear, or the conditions under which children might become fearful or confused, while still allowing for useful information to emerge and be communicated. At the same time the measures are designed to maintain a fair trial, by making sure the evidence can be tested, is reliable/consistent, and expressed unambiguously. This is, for example, achieved by capturing the child's statement on video at the earliest possible time, and thus separating the child from their account. The video then acts as a proxy witness for the reliable storage and stable expression of memory throughout the process. The aim is to provide a mechanism whereby children's voices will emerge and be heard, while their testimony is 'cleansed' of the ambiguity, unreliability and irritability characteristic of child witnesses (Motzkau, 2007). The video, as a proxy memory and proxy witness, is intended to preserve, disambiguate and amplify children's voice in order to express their memory and make it matter in court.

Childhood, gender, credibility

The following excerpt is part of an interview with a crown prosecutor, who explains how helpful she finds the video recorded evidence when assessing the credibility of a child witness, and deciding whether to prosecute or drop a case.⁷

EXCERPT 1

1 CP1: [...] I think they're go:od I think they're I think they're (2) as a way of looking at the child
2 and seeing how the child will come across to the jury ((hmm)) I mean I had one (2) I
3 was really chuffed about this [...] I had ahm a video tape that I watched for a five year
4 old ((hmm)) now (1) that's young for here we don't normally prosecute on the evidence
5 of a five year old ((hmm)) that's it's unusual ((hmm)) (1) ahm and she was an absolute
6 star ahm it was an indecent assault [...] and she descri::bed it (3) perfectly (1) this and
7 this was a child who could not have made it up (1) you know her innocence shone
8 through on the video (1) absolute (1) o:h she was a doll absolute doll ahm (1) and you
9 watched it and there was no corroboration at all (1) nothing absolutely nothing except
10 her word and normally you'd think long and hard about that with just such a small child
11 but (2) [...] she was so good I said well let's let's prosecute because I think a jury will
12 believe every word she says [...] and he got three years he was convicted ((hmm)) that's
13 a really good example of I think how helpful having a video can be because it helps to
14 ass' you to you know ((hmm)) just assess °what they are like° (2) you know you get you
15 get some that're (3) sort of look shif::y but then it's it [...] must be (3) hideous so you I
16 think you've got to take into account (2) that they might look shifty and uncomfortable
17 because they are uncomfortable you know so ahm (3) but it's I think they're very good
18 they're very useful I much prefer them [...]

What does the prosecutor's account and the way it is presented reveal about the way the conditions of credibility are negotiated and established in this specific case, and at this moment? The prosecutor reports an unusual case she was particularly "chuffed about" (line 3), because she considers this a particularly good example of how helpful videos

⁷ The interview was conducted in 2004 for Motzkau (2006). For this chapter the excerpts were edited with omissions indicated by square brackets '[...]'. The overall character of the exchanges is not altered by the omissions. The transcript notations used are a simplified and modified version of the system developed by Jefferson (1984). Transcript notations: Pauses: rounded brackets indicating seconds '(1)'; speaker emphasis: 'underlining'; acknowledgement by other speaker: '((double rounded brackets))'; Silently voiced utterances: '°degree signs°'; Words drawn: 'col::ons'; loudly voiced utterances: 'CAPITALISED'.

are. In concordance with English legal procedure the frame of reference outlined by the prosecutor for the assessment of credibility is the anticipated gaze of the prospective jury (how it “will come across to the jury”, 2). When tracing the prosecutor’s careful elaboration of the criteria of credibility, however, her account shifts between issues of ‘looking’/‘seeing’ on the one hand, and ‘hearing’ the account on the other. She shifts between reference to what the girl said (“she described it perfectly”, 6) on the one hand, and “*looking* at the child” (1) and “*seeing* how the child will come across” (1-2) on the other hand. But what made this evidence so impressive? Why could this child “not have made it up” (7), and why would the jury “believe every word she says” (12)?

Initially it seems it is the girl’s account that convinced the prosecutor, as the girl “described it perfectly” (6). But then she qualifies this by adding that “this was a child who could not have made it up” (7) because “her innocence shone through on the video” (6), which again is underscored by the prosecutor’s emphatic exclamation that the girl was “absolute (1) ohh she was a doll an absolute doll” (8). Highlighting the absence of corroboration, which would be a key criterion of credibility, the prosecutor emphasises repeatedly that there was “*no corroboration at all* (1) *nothing* (.) *absolutely nothing* except her word” (9). Here the last phrase is crucial, because it establishes the distinction between what the girl said, that is, ‘her word’, and what the girl ‘was’, i.e. ‘innocent’, a ‘doll’. This clearly indicates that ‘her word’ would not have sufficed. Yet, the evidential weakness of her word (uncorroborated evidence of a five year old) was of no concern because “she *was* an absolute star” (5-6). But what makes ‘innocence’ and ‘doll-likeness’ such powerful signifiers of credibility?

Notions of 'innocence' and 'doll-likeness' resonate directly with the problematic and gendered implications of the dominant discourses of developmental psychology and child protection. As Erica Burman (1997), suggests, "Repertoires about children embody conflicting assumptions concerned with 'innocence, vulnerability, dependency, nostalgia for the past, hopes for the future, original sin or intimations of the unquashed, unalienated spirit here to come.'" (p. 294). Let me sketch out these conflicting assumptions in some more detail.

Over the past decades a number of scholars have deconstructed the traditional concept of development and exposed its powerful role within scientific, institutional and political discourses around childhood (e.g. Burman 1994, 1997; Walkerdine 1984, 1993; Morss 1990, 1996). In various ways these scholars have problematised the traditional representation of development as a process of natural maturation and linear progressive change by showing that it obscures the powerful political, cultural and emotional dynamics that are implicated within this purportedly 'natural maturation' of children. Unravelling these hidden agendas, Morss (1996) outlines how the assumption of childhood as a 'natural' state of developmental origin implicitly positions children as deficient, and thus warrants their representation as partial, provisional members of society. They are not yet 'beings' but merely 'becomings', not fully present yet as Morss (1996) puts it, and thus not autonomous but dependent and in need of guidance. Burman (2003) points out that implied within these apparently unproblematic (natural) categories of dependency and need for guidance there are broader cultural-political rationales of

governing and controlling children as future citizens. "...it seems there are broad cultural-political investments in maintaining children and young people as docile and dependent through educational, legal and welfare practices that portray them as deficient and therefore in need of training and/or protection." (Burman, 2003, p. 39). Following this critique, the dominant discourse of child protection is constructed around an imagery of children as passive, vulnerable, dependent, and thus deserving of protection. However, implicitly this concept of 'protecting the vulnerable', also provides a rationale for 'keeping' them dependent and controlling them.

Another discourse closely linked to naturalness and dependency centres on the way 'normal' childhood has been idealised as an untainted state of bliss and naïve innocence (Bradley, 1989). Crucially 'innocence' also implies a moral dimension. In the narratives of the modern western world the child has come to be constituted as an a-sexual being. Stainton Rogers and Stainton Rogers (1992, 1998) have minutely traced this 'desexualisation' of childhood showing that it resulted in an atmosphere where any association of children with sexuality has become so unspeakable and unthinkable that issues like sexual abuse can only feature as the unspeakable paramount evil. They argue that it is this 'special-ness' of sex in relation to children and our imaginary identification with their innocence, that causes the polarisation and panic that is so characteristic of debates around child sexual abuse. It is this 'visceral terror', as they put it, that creates the seemingly 'instinctive', but often counterproductive urge to protect children. In this context Burman (2003) points to the gendered dimension within the developmental narrative where the 'child of development' is typically the active, white, rational,

autonomous little boy, while the ‘state’ from which development takes place is “typically a feminised and infantilised arena” (p. 39). Hence it is young girls who most clearly represent development as a state of neediness and vulnerability. However, girls at the same time engender desirability in its most ambiguous force, appealing as much to fantasies of protection as to fantasies of seduction and possession (Stainton Rogers & Stainton Rogers, 1992). This is where discourses of childhood and gender ultimately collide around child protection. They collide because ‘vulnerability’ resonates with passiveness and dependency while seductiveness resonates with an ambiguous form of agency and (sexual) knowledgeableability (if not ‘cunning’). As we will see in the following analysis, this collision creates an additional complication around sex and gender, posing a particular problem where girl’s credibility is concerned.

The ‘child’ as such is usually represented as a-sexual, innocent and thus devoid of gender. In the context of sexual abuse, however, this conception is fractured because the different gendered positions of boys and girls in relation to the (predominantly male) abuser inevitably become relevant. Here it is the ‘girl child’ that is cast in a doubled position of vulnerability, both on the basis of youth and of gender. With vulnerability and the need for protection, on the one hand, and seductive desirability on the other hand, girls become the complex site of surplus moral investments and social control because they threaten the dominant conceptions of childhood innocence.⁸

⁸ This ambiguity and thus need for control is reflected, Burman (2002) argues, in repertoires about girls being dominated by a discourse of original sin, rather than innocence (e.g. debates around teenage

So while different and similarly problematic dynamics apply to boys, it is girls in particular who must be denied any kind of knowledge and agency in relation to sexuality, in order for them to be seen as untainted by implications of active seduction or even complicity. This discursive collision creates paradoxical conditions for girls' credibility as witnesses in abuse cases, because they inevitably end up displaying forms of knowledge that collide with, and threaten the dominant discourse of childhood innocence and protection. Let me return to the transcript segment to develop these points in more detail, and to see how and at what cost the conditions of credibility are established in the example reported by the prosecutor.

The video, as a proxy witness, does work in favour of the girl in this example. But rather than amplifying her voice, as was intended, the video renders the child passive. As indicated earlier, it is not her word that convinces the prosecutor, but as we can see now, it is the degree to which the video demonstrates the girl to fit the criteria of a protectable child. She is a *pretty little girl* ('a doll'), sufficiently 'little' to 'radiate' *natural innocence*, still naive and thus untainted; she is a-sexual like a doll and hence not just unambiguously pretty (i.e. beautiful but not seductive) and vulnerable, but also perfectly *dependent* and *passive* (like a doll), in need of protection and with no mind of her own to fantasise or the capacity to construct or even contemplate a lie. Crucially a 'doll' does not speak, but a

pregnancies, prosecution of rape, issues of consent and the increasingly popular 'girls-asking for it' discourse).

doll radiates these qualities. They do not have to be voiced or claimed explicitly, but they can be seen ‘shining through’ (7-8) on the video. These are the discursive resources mobilised within the repertoires of ‘doll-likeness’ and ‘shining innocence’. Hence these are the discursive resources that give meaning to the prosecutor’s claim that “this was a child who could not have made it up” (7).

These conditions of credibility operate at a cost. While they work in favour of the girl in this particular example, when considering them in the context of child witness practice in general, it becomes clear that they create problematic positions for the majority of child witnesses. When unable to fit the ‘doll-category’, “looking shifty” (15) as the prosecutor puts it, or indeed having reached an age where girls as adolescents are very often seen as ‘not quite so innocent’, ‘too knowledgeable’, or prone to deceit and promiscuity, they stand less chance of appearing credible or even getting to court. I will examine this problem in more detail in relation to the next interview excerpt.

Innocence, agency, gender: credibility colliding with protection

In the following excerpt an English high court judge replies to a challenge by the interviewer about the appropriateness of the jury system for the assessment of child abuse cases. While initially defending the jury system, he moves on to report that juries do make unexpected acquittals in cases where children have failed to complain about an ongoing abuse.

EXCERPT 2

1 Judge: [...] most of us feel that jurors come up with the right verdicts ((hmm)) ahhhm and you
2 can always find an answer well I know wha' y' know °y' ca' why did they find not guilty
3 the:re° then you always know OHHH it was because you know he didn't tell the teacher
4 or you know ((hmm)) I mean that's usually the fatal thing is when they don't tell their
5 parents the 's what juries don't understand and a little girl said it once (2) I'm only a child I
6 didn't know what I you know she was sort of four years at doing it °why didn't you
7 anyone you could tell your mother when that started° [*voiced softly as if addressing a child*] (1) I
8 was only a child I didn't know what to do I was frightened he was my father (1) NOW
9 you hope juries would understand that but cases where there're acquittals acquit u::sually
10 where kids have failed to complain in circumstances where you would think they would
11 ((hmm)) ahhhm but they not because as this one said I I was only a child she was nine or
12 ten °I think° ((hmm)) never want to do it which I didn't say like I'm saying well this 's
13 what she was saying which was very good [...]

9

Just as in the previous example, this excerpt refers to a young girl, but in this case the girl is not deemed credible. Interestingly the child in this example is reported to have spoken openly and unambiguously to the court. Following the judge's account, the girl delivered a clear and plausible explanation for why she had failed to complain at the time. Notably the girl herself explicitly enlists the traditional developmental discourse; more precisely, she enlists the protection discourse and appeals to her own helplessness. She appeals to her qualities as a victim by presenting herself as being “*only* a child” (7) hence innocent and dependent, which meant she “didn't know what to do” (8), was passive and helpless. She was “frightened” (8), vulnerable and unable to act for herself. Given this elaborate recruitment of the ‘protection discourse’, why is her voice still problematic? Why will

⁹ J2: 753-783.

juries “usually” (9) acquit in such cases, when in the previous excerpt the jury was reported to have believed “every word” the girl said (excerpt 1, line 12)?

To untangle the conflicting discourses operant in this excerpt, we need to examine what it is that “you hope juries would understand” (8-9), as the judge puts it. Further, we need to see why it should be “fatal” (4) for children not to “complain in circumstances where you would think they would” (9-10). In saying “*you* would think” the judge presents this as a generalised common sense ‘we all share’ about children and when they ‘should’ complain. But what constitutes this apparent common sense notion of such circumstances? Referring back to the work of Burman (1994, 2002, 2003) and Stainton Rogers and Stainton Rogers (1992, 1998), we can see that the girl in this example is caught at the paradoxical intersection of three colliding discourses. These are the discourses around innocence/protection, agency/credibility and gender/sexuality.

The child protection discourse, arranged around the developmental meta-narrative of children as a-sexual, dependent and innocent victims (Stainton Rogers & Stainton Rogers, 1992), implies that children should display what could be called an immediate response to harm, and an ‘instinctive’ repulsion against anything of a sexual nature. Hence it ‘should’ come ‘natural’ to a child to instantly complain had something as terrible as sexual abuse happened to them. This runs counter to established findings by researchers and clinicians, who have pointed to multiple reasons why abuse is often not disclosed (Cawson et al. 2000; Jones, 2000). Jury members’ common sense however, as reflected in the judge’s account, clearly resonates with the implications of discourses around childhood innocence/protection. Juries struggle to ‘understand’ that a child would

not complain, which implies that the failure to do so would be considered suspicious and can serve to undermine the child's credibility.

Further, the colliding issues of agency and credibility at work here can be illustrated in relation to the ambiguous rendering of article 12 of the UN convention of children's rights discussed earlier in this chapter. This article refers to those children who are "capable of forming" their own views, and it states that due weight should be given in "accordance with age and maturity". Yet maturity and the capability to form one's own views are intricately linked to agency, accountability and thus responsibility. That is, displaying independency, agency and accountability is commonly taken to be an indicator of maturity. Thus, being able to display signs of maturity and agency, will also contribute favourably to being perceived as a credible witness. A person who is seen to be independent, accountable and in charge of their life, someone who can present themselves as a responsible agent within their own narrative, will be considered capable of speaking the truth in a mature, accountable and responsible manner.¹⁰ Yet, for child witnesses in abuse cases these competing demands are difficult to balance because appearing too capable of forming views ('being a little too assertive'), or appearing too

¹⁰ Ingrid Palmay (2005) delivers an intriguing analysis of a dynamic closely related to my example. Palmay analyses the accounts of refugee women in Johannesburg, South Africa, who have been displaced from the African Great Lakes region. She explores how the romanticised positioning of women as politically inactive, not guilty of, or accountable for conflict, positions them as pure victims of violence and persecution. However, this positioning will in return silence them in their own resistance and claims to agency. Innocence here resonates with deserving of help as well as with passivity and not having a politically credible or active voice. For a related but slightly different take on 'agency' see Reavey & Brown (2006).

independent (or indeed 'aggressive'), will render them unable to lay claim to the protection discourse.

Finally, and crucially for the girl in this second example, appearing too 'active' and 'knowledgeable' in relation to sexuality, turns her into a dubious witness. She is not passive enough and not sufficiently detached from issues of a sexual nature. In the context of the 'failure to complain' or resist, such doubts could even amalgamate into the implicit or explicit suspicion of her own complicity or guilt.¹¹

The girl is not seen as credible precisely because she is speaking up in court and trying to account for her story. The paradoxical conditions of credibility operating in this practice mean that while the girl in the first example manages to strike the delicate balance of passive, yet innocent vulnerability, the girl in the second case is too passive (in the past) and at the same time not passive enough (in court), and even though the judge appreciates her explanation (13), this girl is not considered credible. By definition, passiveness, innocence and vulnerability cannot be voiced or 'argued', they need to 'shine through', they need to radiate, express themselves 'naturally' to be recognised by the spectator.

¹¹ Clare MacMartin's research (MacMartin 2001) offers an intriguing example of a very similar dynamic at work in Canadian courts. She analysed offence descriptions in criminal trial judgements (in Canada judges will provide an elaborately reasoned, written account of the judgement). She found that in some cases descriptions of complaints provided resources that judges "mobilized as a warrant for doubt by contrasting children's negative reception of sexual abuse with the innocuous or positive character of subsequent social contact with offenders. This argument emphasizes the agency of children in consenting to affiliate with offenders, presuming that authentic victims can and would avoid further involvement." (MacMartin 2001, p. 9).

In view of the fact that the circumstances of the girl in this second case are by no means unusual, it becomes clear that child witness practices resolve the paradox of credibility at the cost of rendering a potentially large number of child witnesses lacking in perceived credibility. Ultimately the conditions of credibility that operate around the expression of children's memory in this practice are in danger of systematically rendering children speechless or in turn positioning them as problematically speaking up against justice.

To avoid misunderstanding let me clarify my analytic position in relation to the cases described here. Both excerpts refer to very serious 'real life' cases. In the absence of any further information it is impossible to even speculate about what exactly led to the respective trial outcomes. In this analysis I did not mean to examine or 'compare' the actual cases, nor did I mean to make claims about the appropriateness of legal procedure or decisions. My analysis focussed exclusively on the way the legal professionals presented those cases, giving us an exemplary glimpse at how the conditions of credibility are expressed and negotiated in this specific context.¹²

The expression of memory: constructing and realising

I would like to take another look at the prosecutor's and the judge's account, because they both express a peculiar, if transient, paradox that is worthy of further examination.

Looking at lines 15-17 in the prosecutor's account (excerpt 1), we can see that the

¹² I would like to express my gratitude to the prosecutors and judges who agreed to be interviewed for this research, and to the Crown Prosecution Services and the Royal Courts of Justice who approved this research. Without their engagement and collaboration this research would not have been possible.

prosecutor concludes her statement with the paradoxical plausibility that “you’ve got to take into account that they might look shifty and uncomfortable because they are uncomfortable” (16-17). This is paradoxical because the prosecutor has just elaborated at length that videos are helpful in assessing credibility, precisely because they allow her to see that some witnesses are ‘shifty’ while others display the ‘shining innocence’ she refers to in her example of the young girl. By adding that ‘shiftiness’ could also be a ubiquitous sign of (justified) discomfort, rather than an indication of insincerity, she contradicts the dominant criteria of credibility she has identified as being so distinctly helpful a moment earlier. This would mean that “just” assessing “what they are like” (14) is not at all straightforward, and the video creates more ambiguity than it resolves. What I find remarkable about this paradox is not the personal self-contradiction (or her potential awareness of it). Rather, this ambiguous turn shows more generally that the paradox of credibility is not permanently resolved by the dominant discourses the prosecutor employs and that we could see underpinning this practice (see earlier analysis of the prosecutor’s account). The prosecutor’s account illustrates that the paradox of credibility remains at the heart of these concrete practice operations, demonstrating the constitutive volatility of this practice. This paradox, or as we can say transient openness, at the heart of this practice, communicates itself briefly via the contradictory turn the prosecutor adds, apparently casually, to conclude her account.

The judge’s overall statement (see excerpt 2) expresses a transient paradox very similar to that expressed by the prosecutor. He says he feels “that jurors come up with the right verdicts” (1), but then he moves to present a case example where, even though he avoids

explicitly saying so, the jury ‘usually’ does *not* get it quite right, or indeed fails to understand something that “you hope juries would understand” (9). As with the video in the prosecutor’s example, we can see that the jurors’ ‘common sense’ in this case adds more ambiguity than it resolves. It is not surprising that an English judge should trust the jury system, and as in the previous example, I am not so much interested in the self-contradiction (or the judge’s potential awareness of it). But at the moment of utterance the judge’s statement demonstrates that the paradox of credibility is not eradicated by the dominant discourses that are implicitly guiding the ‘common sense of the jury’. The paradox communicates itself through the judge’s account, and while it is transient in its expression (i.e. judge and prosecutor ultimately gloss over it and it does not ‘overthrow/contradict’ practice as such), its persistent recurrence indicates that the concrete operations of practice, as they occur, are quite unstable and volatile. In advancing this point, my aim is not to depict individual instances of ‘bad practice’, ‘unprofessional conduct’ or legal ‘malpractice’. On the contrary, my main point is to observe that these ‘operative paradoxes’ are constitutive elements of legal practice as such.

Understood in this way we can see that these paradoxes are not rare occurrences or special instants of personal doubt. A broader look at child witness practice reveals that it is riddled with such transient paradoxes (Motzkau, 2006). They continuously pervade the powerful institutional structure through which the expression of memory is negotiated. They express the ambiguities that underpin the concrete operations of this practice, and they highlight that children’s credibility is not as such set and defined by the dominant

discourses. In this sense the paradoxes express the fact that the ambiguities surrounding children have to be negotiated and contained actively and continuously for practice to function. Such a dynamic depiction of legal practice collides with the traditional picture of legal practice as driven by static rules and a concern for an objectifiable, absolute truth. Clearly, the law must orient towards ‘what really happened’, and this determines its call to truth. Still, having traced the fact finding dynamic of the law and some of the concrete operations that negotiate the conditions of credibility, it becomes clear that we cannot determine what constitutes this ‘absolute truth’ of memory independently of its expression within those practices. The continuous process, the dynamic of the expression of memory within practice, is an inextricable part of the ‘truth of memory’.

This is why in order to function, legal practice must operate dynamically. The manifestation of truth, or indeed ‘fact finding’, features as a momentary punctuation or realisation of/within the ongoing dynamics of practice as it is performed. This finding need not imply that the law is simply ‘relative’ or systematically ‘fabricating’ its truths. Recognising the importance of the concrete ‘fact-finding-process’ of legal practice, means to become alert to the fact that practices of the law (just as other practices) need to continuously and actively reassert and establish their relation to this truth, and the way it is expressed by memory. In a very real sense legal practice is in the simultaneous business of realising and constructing.

Concluding

In this chapter I have aimed to demonstrate how a detailed exploration of history, theory and practice surrounding child witnessing and sexual abuse, could open up new perspectives for the debate surrounding memory and sexual abuse.

The analysis presented here does not conclusively explain the apparent ineffectiveness of the reformed child witness practices in England/Wales. However, it does suggest that we need to adopt a more detailed perspective towards the ways in which special measures operate in the context of legal proceedings. We could see that, even beyond potential issues of 'bad practice' or 'unprofessional conduct', special measures constitute a systematic structural problem within legal practice. The attempts of the legal system to create 'opportunities' for children's voices to be heard, end up rendering them passive and inaudible. We could see how the well intentioned special measures systemically perpetuate the problematic implications of discourses around childhood, protection, gender and credibility. Further, we could say that these measures in effect protect the courts from the ambiguity children carry. Special measures could be considered as an attempt by the legal system to produce the kinds of child witnesses it can handle--passive victims whose 'innocence shines through' on videos, while they do not actually say anything or even speak up. In this context we could see that the child's voice is doubly precarious (i.e. endangered and dangerous), and the (justified) call for children's protection ends up undermining their credibility and eclipsing their actual right to speak. Considerations of child witnesses' credibility are pertinent for problems surrounding adult reports of childhood trauma. The dynamics surrounding child witnesses inevitably feed into the public and legal discourses through which the truth value of adult

recollections of child sexual abuse is negotiated, making their stories even harder to tell. In a perfidious twist, we could speculate that the more our current legal systems are (perceived to be) struggling to deal with child witnesses/victims of sexual abuse, the larger the number of those who might only report/disclose their sexual abuse when they are adults.

In order to understand memory, we need to examine the concrete and shifting conditions of its expression. This means attending to the conditions of credibility as they are continuously constituted through the operations of, and encounters within different practices (e.g. legal, therapeutic, research). Legal practice is one of the most powerful institutional practices concerned with the expression of memory hence examining the micro-dynamics of legal practice encounters could make a valuable contribution to wider debates about the ways memory matters.

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